

*United States Court of Appeals
for the
District of Columbia Circuit*



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 22545
(CRIMINAL NO. 914-67)

Joseph L. Hooper,
Defendant-Appellant

v.

United States of America,
Appellee

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 26 1969

Nathan J. Paulson
CLERK

Thomas G. Shack, Jr.
1101 17th Street, N. W.
Washington, D. C. 20036
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the authenticity of photographs need be demonstrated when they are sought to be admitted into evidence as primary or substantive evidence and not merely as illustrative or secondary evidence.
2. Whether in a prosecution for violation of 18 U.S.C. 2112, robbery of personal property belonging to the United States, must the prosecution prove that the robber, at the time of the alleged offense, specifically knew that the property he was robbing was property of the United States Government.
3. Whether the prosecuting attorney prejudiced the jury against Appellant by erroneously, albeit perhaps unintentionally, calling the jury's attention to a "missing witness."

Note: This case has not previously been before this court.

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Statute Appellant relies upon:

1. Act of June 29, 1940, C. 445, 54 Stat. 688, U.S.C.A.
Title 18, Rule 52(b) of the Federal Rules of Criminal
Procedure:

"Plain error or defects affecting substantial
rights may be noticed although they were not
brought to the attention of the court."

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 1291, Title 28, of the United States Code and Rule 37 of the Federal Rules Of Criminal Procedure. This is an appeal from a judgment of conviction entered by the lower court on a jury verdict. This appeal was filed on October 29, 1968.

STATEMENT OF THE CASE

The defendant was charged in a five-count indictment with having robbed \$824.05 in currency from the United States of America in violation of 18 U.S.C. 2112; with having robbed \$824.05 from the custody of one Virginia D. Wallace, such currency being property belonging to the United States of America, in violation of 22 D. C. Code 2901; and with having assaulted Virginia D. Wallace, Earl Briggs, and Michelia Largin with a dangerous weapon, that is, a pistol, in violation of 22 D. C. Code 502.

1/
At trial, the government alleged and attempted to prove that the appellant was one of four men who, on April 5, 1967, entered and robbed the rental office of the Green Leaf Gardens, 201 M Street, S. W., Washington, D. C. The Green Leaf Gardens apartments are owned and operated by the National Capitol Housing Authority, an agency of the United States Government. (Tr. 29).

1/ There were actually two trials in this case. The first trial resulted in a hung-jury. This appeal, therefore, is from the judgment of convictions entered on a jury verdict in the second trial.

2/ References, unless otherwise stated, are to the transcript of the record.

About 10:00 a.m. on April 5, 1967, the government alleged, four men entered the rental office. Two of them stayed in the background while the other two approached the counter and, after waiting for a paying tenant to leave the premises, pointed pistols at Miss Wallace, the cashier, and Mr. Briggs and Miss Largin, other staff employees of the agency, all of whom were behind the counter performing their normal daily tasks. Since Miss Wallace was the cashier, she had custody of the government's money in the cash drawer, which was built into the rear of the counter.

(Tr. 28).

Miss Wallace testified that as she was waiting on a tenant, one of the four men got into line behind this tenant and started pulling a sweater over his mouth. (Tr. 17). After the tenant departed, this man said "This is a holdup." Miss Wallace was backing away from the counter at this time, having become suspicious. Miss Wallace was able to run out of the rear office door to the rear maintenance area screaming that the rental office was being held up. She was unable to identify any of the robbers. (Tr. 39).

Miss Largin's testimony was similar to that of Miss Wallace but, since she had remained in the office during the entire episode, she described the events which had occurred after Miss Wallace's departure. She

testified that one of the robbers jumped over the glass partition above the counter after Miss Wallace departed, that he had a gun in his hand, that this man requested Mr. Briggs, who was seated at his desk, to open the safe, which was located behind the counter, that he struck Mr. Briggs on the head with the gun when Mr. Briggs informed him that he did not have the combination to the safe, that Mr. Briggs fell to the floor, that this robber, whose face she was able to see, then approached her and told her to open the safe, that he shoved her and told her to lie on the floor when she advised him that she did not know the safe's combination, that she heard "money noises" coming from the side of the office where the cash drawer was located, and that she remembered having seen this robber at an earlier date when he had come in the office and asked for a rental application. Miss Largin identified the appellant, Joseph L. Hooper, as this robber. (Tr. 45-56).

Mr. Brigg's testimony was similar to that of Miss Largin and he too identified the appellant as the man who had struck him. (Tr. 61-72).

One John Marshall Robinson, a maintenance officer for the Green Leaf Gardens, testified that he was in his office in the rear of the rental office when Miss Wallace ran into his office screaming that the rental office had been robbed. He then went out of his office, saw two men

running across the parking area, get into a car which he described as a "dark, '56 Ford" (Tr. 98), and drive off. He pursued the getaway car in another car. He testified that after having lost track of the getaway car, he spotted it again heading towards him. He followed it again, was able to write down the license plate number - 294 457 - and returned to the office when he handed the number to the police (Tr. 80-82). At a later date, Mr. Robinson testified, he was summoned to the police station and identified the getaway car. While on the stand, he was shown pictures, government's Exhibits 3 and 6, two of which he identified as the car he had chased and had identified at the police station (Tr. 87-88). He did not testify that any photographs had been taken in his presence while he was at the police station.

One Marion Jones, a maintenance clerk for the National Capitol Housing Authority, testified that at the time of the alleged robbery, he was in the lunch room adjacent to the maintenance shop, heard Miss Wallace announce the holdup, left the building, spotted two men, and pursued them in his car (Tr. 101-102). He described the getaway car as a "dark vehicle, reddish in color" . . . "bright and shiny" (Tr. 102) . . . "old car" . . . "Ford" (Tr. 106). He testified further that he lost sight of the car but then noticed the car after it had parked (Tr. 107). Mr. Jones did not know that anyone else was also pursuing the getaway car at this

time. Mr. Jones testified that he also jotted down the license number of the car - 254 457 - (Tr. 109). He, too, was later called to the police station to identify the car and, at the trial, identified government Exhibits 3 and 6 as photographs of that car (Tr. 110-111). He did not say that any photographs had been taken in his presence.

Police Sergeant Vaccaro testified that he had been assigned to investigate this case and that on April 7, 1967, the police discovered the alleged getaway car in an alley. He stated that he found a brown envelope bearing a medical prescription, on the rear seat of this automobile. This prescription bore the appellant's name, Joseph L. Hooper, (Tr. 126-128). The officer also testified that the vehicle had been impounded and that witnesses Stollman, Jones, and Robinson, were asked to and did identify it (Tr. 128). The officer was then shown government Exhibits 3, 4, 5 and 6 which he identified as being "photographs of the 1955 Ford which was impounded which had the Manila envelope on the rear seat and which was later taken to police headquarters." He agreed that they were photographs of the car which the witnesses had examined (Tr. 129). The officer did not state that any of the photographs had been taken in his presence or in the presence of any of the witnesses.

A Mr. Warren A. Lanes, Jr. testified that at about 10:20 a.m. on April 5, 1967, he had been working on his truck in an alley when a

"1955 Ford, four-door black dull color, dark color car", driven by two men didn't want to yield right-of-way to another car in the alley. One man got out, dropped his hat and didn't pick it up. (Tr. 140-141). He also was shown the photographs comprising government Exhibits 3, 4, 5 and 6, and stated:

"No. 3 resembles most of what I saw." (Tr. 145).

At the trial, it was stipulated that in fact \$824.05 had been the amount taken in the alleged robbery; that this money had been personal property belonging to the United States; and that a medical prescription matching the number of the prescription which had been found in the car, had indeed been issued to the appellant, Joseph L. Hooper, (Tr. 148-149).

At the close of the government's case in chief, counsel for the defendant-appellant moved the court for a judgment of acquittal on count numbered one, the federal robbery count, on the ground that the government had failed to prove scienter, i.e., that the government had failed to show that the defendant-appellant specifically knew at the time of the alleged robbery that he was robbing federal government property. This motion was denied (Tr. 151-164, 231).

1/ The government attempted to demonstrate that this hat, Government Exhibit #1, belonged to the appellant.

Appellant took the stand in his own behalf and testified that on the day and time in question he had been at home babysitting for his sisters. (Tr. 167). He denied having robbed and assaulted those persons involved. (Tr. 168). He remembered this particular day because this was the day his mother asked him to mind his sisters while she and his brother kept an appointment downtown (Tr. 167, 176). Hooper also testified that about 9:30 a.m., on this day, a neighbor, Raymond Gordon, came to his house and ^{1/} used his telephone (Tr. 168).

The appellant was convicted by a jury and on October 25, 1968, was sentenced to eight (8) years imprisonment pursuant to 18 U.S.C. 5010(c).

STATUTE INVOLVED

The statutes for which appellant was indicted and convicted are:

1. Act of June 25, 1948, Ch. 645, 62 Stat. 796, United States Code, 1964 Edition, Title 18, §2112:

1/ Mr. Gordon subsequently testified that at 9:25 on April 5, 1967, he did go to the Hooper home, made a phone call, and that the appellant was still at home when he, Gordon, left (Tr. 207-210). On cross-examination, Mr. Gordon stated that he was in the habit of using the Hooper phone, and that he remembered this particular day because when the appellant "call[ed] my attention to it, I checked the calendar and marked it down on the calendar after he told me what happened." (Tr. 216).

"Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than 15 years."

2. Act of March 3, 1901, 31 Stat. 1322, Ch. 854, §810, District of Columbia Code, 1961 Edition, as amended August 9, 1955, §22-2901:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 6 months nor more than 15 years."

3. Act of March 3, 1901, 31 Stat. 1321, Ch. 854, §804, District of Columbia Code, 1961 Edition, as amended August 9, 1955, §22-502:

"Every person convicted of an assault with attempt to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years."

STATEMENT OF POINTS

I The trial court committed plain error in admitting into evidence government Exhibits 3 and 6 (for identification), alleged photographs of the getaway car, inasmuch as the authenticity of those photographs had not been demonstrated. (With respect to Point I, appellant respectfully requests the Court to read the following

pages of the record: R. 87, 88, 110, 129, 145, 150, 272, 273.)

II The trial court erred in denying the appellant's motion for judgment of acquittal on count one of the indictment, the federal robbery count, inasmuch as the prosecution had failed to prove an essential element of the charge, namely, that the appellant specifically knew at the time of the alleged robbery that the Green Leaf Gardens was an agency of the federal government. (With respect to Point II, appellant respectfully requests the Court to read the following pages of the record: R. 151-164, 231.)

III Plain error was committed when the prosecution erroneously, although unintentionally perhaps, called the jury's attention to a "missing witness." (With respect to Point III, appellant respectfully requests the Court to read the following pages of the record: R. 177-180.)

SUMMARY OF ARGUMENT

I

The trial court committed plain error in admitting into evidence government Exhibits 3 and 6, alleged photographs of the

getaway car, inasmuch as the authenticity of those photographs had not been demonstrated.

II

The trial court erred in denying the appellant's motion for judgment of acquittal on count one of the indictment, the federal robbery count, inasmuch as the prosecution had failed to prove an essential element of the charge, namely, that the appellant specifically knew at the time of the alleged robbery that the Green Leaf Gardens was an agency of the federal government.

III

Plain error was committed when the prosecution erroneously, although unintentionally perhaps, called the jury's attention to a "missing witness."

ARGUMENT

I

The trial court erred in admitting into evidence government Exhibits 3 and 6, alleged photographs of the getaway car, inasmuch as no foundation for those photographs had been demonstrated.

1/

As stated by McCormick:

"the prime condition on admissibility is that the photograph be identified by a witness as a portrayal of certain facts relevant to the issue, and verified by such a witness on personal knowledge as a correct representation of those facts . . . nor need the witness know anything of the time or conditions of the taking. It is the facts represented, the scene or the object, that he must know about, and when this knowledge is shown, he can say whether the photograph correctly portrays these facts. When the photograph is thus verified, it comes in as demonstrative evidence."

In the case at bar, the government offered the photographs into evidence not merely as illustrative of the testimony of witnesses Robinson, Jones, Lanes, and Vaccaro, but, rather to give credence to or to corroborate the testimony of these witnesses. Thus, the photographs were not merely illustrative, they took on a substantive or primary gloss. Thus, the prosecutor asked Mr. Robinson (Tr. 87):

Q. I will ask you, sir, if you will examine those [photographs] and state to the ladies and gentlemen of the jury and the Court, whether you recognize

the subject in any of those photographs.

A. Yes, yes, sir. This looks like the car that I saw at the police headquarters, and also like the car that I saw the men in.

A. It looks like the car I saw at police headquarters and the car I saw the two men get into on this particular day of the robbery. (Tr. 88).

Mr. Jones responded to a similar question thusly:

"These two [Exhibits #3 and 6] appear to be the vehicle."

Sergeant Vaccaro was asked (Tr. 129):

Q. Are the subject of the photographs which are marked as government's Exhibits 3 and 6 for identification, a reasonably fair and accurate photograph of that automobile? (Emphasis added.)

A. Yes, sir. They are photographs of the 1955 Ford which we impounded which had a Manila envelope on the rear seat and which was later

taken to police headquarters.

Q. Is that also the same automobile which was examined by the witnesses whom you have identified previously?

A. Yes, sir.

Lastly, Mr. Lanes testified (Tr. 145):

"No. 3 [photograph #3] resembles most of what I saw.

Q. Has there ever come a time when you saw the automobile again, to your knowledge?

A. At No. 4 Precinct.

Moreover, in moving the admission of these photographs, the prosecutor stated:

"In light of the testimony, if the Court please, I will offer only government's 3 and 6 into evidence, those being the only two of the exhibits, I believe, that were definitely identified by any of the witnesses."

(Tr. 150).

And, in his closing argument, the prosecutor stated (Tr. 272-273):

"In each case the witness identified photographs.

. . . . The first being government's Exhibit 3

for identification, as the automobile they had

followed, and if you choose to take these pictures

into the jury room, you may, and you will see on

those pictures that the license number of this

particular motor vehicle conforms to the license

numbers which were reported by Mr. Robinson,

and five of the numbers conformed to the number

that was written down by Mr. Jones."

"In each case, of course, the automobile was

identified as the car they had followed."

(Emphasis added.)

It is obvious, therefore, that the government offered those photographs into evidence as being photographs of the very car which the robbers had used. The photographs were not admitted merely to give the jury some idea as to what the getaway car may have looked like. These photographs were purported to be pictures of the car allegedly used by the robbers and impounded by the police. The jury was led to believe that the

witnesses actually identified the car in the photographs. However, none of the witnesses had stated that they had identified the license plates on the car they had viewed at police headquarters, and none of the witnesses had testified that any photographs had been taken in their presence at police headquarters.

In view of the fact that the jury may have attached undue weight to these photographs, i.e., the jury may have thought of these as "substantive" rather than "illustrative" evidence, it is submitted that the conviction should be reversed. In order to use these photographs as primary evidence, the prosecutor should have demonstrated by testimonial evidence that the subject of these photographs was the same car that the witnesses had identified at police headquarters. The point is that neither witnesses Robinson, Jones, or Lanes, nor Sgt. Vaccaro knew of their own knowledge that the car appearing in those photographs was the actual car used in the robbery, although this is exactly what the prosecutor argued to the jury (Tr. 272-273). It is submitted that a "chain of custody" for these photographs should have been shown in view of their substantive, corroborating use. These photographs were "testimony" and were placed into evidence to corroborate the government's witnesses. As such, their competency or authenticity should have been demonstrated.

II

The trial court erred in denying the appellant's motion for judgment of acquittal on count one of the indictment, the federal robbery count, inasmuch as the prosecutor had failed to prove an essential element of the charge, namely, that the appellant knew at the time of the alleged robbery that the Green Leaf Gardens was an agency of the federal government.

The trial judge should have granted defense counsel's motion for a judgment of acquittal on count one of the indictment (Tx. 151-164, 231). The government failed to prove that the appellant knew he was taking federal property at the time he allegedly robbed the Green Leaf Gardens rental office. No indicia of federal ownership were present. In fact, for all intents and purposes, the public at large has no reason to believe that the Green Leaf Gardens are owned and operated by the federal government.

In the case of Findley v. United States, 362 F. 2d 921 (C. A. 10, 1/ 1966), the court reversed a conviction for violation of 18 U.S.C. 641 because:

"It was necessary for the government to prove beyond a reasonable doubt that the defendant

1/ "whoever embezzles, steals . . . any record, voucher, money, or things of value of the United States or of any department or agency thereof . . . "

knew that the property involved belonged to, and was stolen from, the government." (362 F. 2d 921, at p. 922).

This court, however, in Mitchell v. United States, 129 U. S. App. D. C. 292 (1968) was of the opinion that:

"[Findley] has little argumentative force, however, because the very question which now concerns this court - whether knowledge of government ownership is a necessary element of the statutory offense¹ - was seemingly assumed by the Court of Appeals for the Tenth Circuit." (129 U. S. App. D. C. at p. 296).

Nevertheless, in Mitchell, this Court ruled knowledge of government ownership to be a necessary element of the §22-2206 offense.

It is submitted that the government must prove this same scienter when it seeks, as in the case at bar, to convict a person for violation of 18 U.S.C. 2112, which reads:

1/ D. C. Code Ann 522-2206 (1967):

"Whoever shall embezzle, steal, or purloin any money, property or writing, the property of the District of Columbia, shall suffer imprisonment for not exceeding five years or be fined not more than five thousand dollars, or both."

"Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years." 1/

It is submitted, therefore, that on the authority of Mitchell, the trial court should have granted the defendant-appellant's motion for judgment of acquittal on the federal robbery count. The government neither sought to prove specific knowledge on the part of Hooper, nor did it show the existence of facts which would have put a reasonable person on notice of the United States ownership.

III

The prosecution severely prejudiced the appellant by erroneously calling the jury's attention to a missing witness.

1/ Note the appellant Hooper, in the instant case, was convicted on all five counts of the indictment and received an 8 year concurrent sentence. It is submitted, nevertheless, that this fact should not bar this court's consideration of this issue since that would leave an added, illegal, and unnecessary conviction on appellant's record. Cf. United States v. Fabianich (12 U. S. App. D. C. 319 (1962)).

It is submitted that prejudicial error was committed at the trial in this case when the prosecutor cross-examined the defendant-appellant. The appellant's defense was alibi. Thus, the jury was required to choose between the credibility of the prosecution's "eyewitnesses" and the defendant and his witness.

The appellant testified that he, on the date and time in issue, had been babysitting for his two sisters while his mother kept an appointment. He stated that a neighbor, Raymond Gordon, had entered his home on this particular morning and had received permission to use the phone. Mr. Gordon subsequently testified.

At one point in the appellant's cross-examination, the prosecuting attorney asked (Tr. 180):

Q. Now, did you discuss with your mother after that about April 5, or where she was?

A. Yes.

Q. Now, did she remember what she was doing on April 5, when you talked with her?

A. Yes, she recalled having an appointment with this attorney.

Q. Is your mother here today?

A. No, she is not.

It is submitted that the jury could only have inferred from the prosecutor's last-quoted question that the appellant's mother should have been called by the defendant as a witness to corroborate, if possible, her son's testimony. Thus, it is submitted, that question was, in effect, argumentative comment.

The "absent witness rule", that, absent a satisfactory explanation, if a party has it within his power to produce a witness who is relevant to any material issue, the failure of that party to produce that witness raises a presumption that, if produced, the witness' testimony would be unfavorable to that party, is based upon a general proposition that reliance on weaker and less satisfactory evidence justifies an inference that the evidence not produced would be unfavorable. See Annotation, 5 A.L.R. 2d 895. A jury instruction to that effect is given. However, it has been held that if such a witness is available to both parties:

". . . the law does not permit an instruction which limits the inference which can be drawn by the jury under such circumstances to an inference against the defendant (citing cases)."
Billeci v. United States, 87 U. S. App. D. C. 274 at 279.

Only if an inference or presumption about an absent witness is fairly raised, is "comment" by the other party to the jury about the absent witness permitted. Graves v. United States, 150 U. S. 118 (1893); Milton V. United States, 71 U. S. App. D. C. 394 (1940).

In the present case, no inference was permitted to be drawn inasmuch as appellant's mother was available to be called by both sides (Tr. 230) and because it could not be inferred that her testimony, if presented, would have been unfavorable to the defendant (Tr. 231-265). It was, therefore, prejudicial error for the prosecutor to have asked the above-quoted question and for the trial judge not to have excluded the question and answer on his own initiative. The "comment" raised an erroneous inference which severely prejudiced the appellant since this inference undoubtedly affected the jury's choice as to whether or not it would believe the prosecution's witnesses or the appellant's; that is, the inference raised by the "comment" may have swayed the jury into giving greater weight to the "eyewitness" testimony than to the appellant's alibi. The comment constituted plain error and the fact that the defendant-appellant's counsel failed to object does not abate the prejudice.

At minimum, it is submitted, the defendant-appellant was entitled to a cautionary instruction to the effect that no inferences should be drawn

from the failure of Hooper's mother to testify. Pennewell v. United States, 122 U. S. App. D. C. 332 (1965). Even the trial judge, during a lengthy (Tr. 231-265) argument on whether to give the "missing witness" instruction to the jury, noted:

". . . . there may very well be some jurors who will say, 'Gee whiz, I wonder why that government lawyer didn't hit upon the fact that the mother isn't here?' I don't think it is unnoticed. I think it is screaming out, why isn't she here? But, I really think so." (Tr. 265).

The record demonstrates that the appellant's mother was "available" to both sides inasmuch as the defense counsel offered the appellant's mother as a witness. (Tr. 230, et seq.). This offer was made "at the bench in low monotone" (Tr. 230) so that the jury would not overhear the conversation and draw any unwarranted, prejudicial inferences therefrom. It is submitted, however, that the damage had already been done when the prosecutor asked the defendant "Is your mother here today?" (Tr. 180). Thus, had the jury been unaware at the time of the question of the potential significance of the failure of the appellant's mother to testify, the prosecutor's statement, albeit unintentional, unfairly and sufficiently prodded the jury to its certain realization. It is submitted that this "comment" and the lack of a correcting instruction, severely prejudiced the defendant in the jury's eyes and necessitates a reversal of this conviction. Pennewell v. United States, supra.

CONCLUSION

Appellant submits that, for the reasons specified above, the judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief of Appellant was served by hand this 26th day of May, 1969, on

The Honorable Thomas A. Flannery
United States Attorney for the District of Columbia
Attorney for Appellee

/s/ Thomas G. Shack, Jr.
Thomas G. Shack, Jr.